92-1922

No. _____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PEOPLE OF THE TERRITORY OF GUAM,

Petitioner,

vs.

DANIEL LUCIEN TURNER,
MARTIN M. VILORIA,
JOHN GOKITA MANIBUSAN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit's acceptance of the "two inference" definition of reasonable doubt, as an accurate expression of Circuit law, conflicts with the holding of *Holland v. United States*, 348 U.S. 121 (1954), and with various Circuits' construction of *Holland*?

II. Whether the Ninth Circuit, by reviewing an ambiguous jury instruction for prejudice under a "reasonably possible" standard, rather than for a "reasonable likelihood" thereof, conflicts with the standard set in *Boyde v. California*, 494 U.S. 370, (1990), and with the authority of Circuits construing *Boyde*?

III. Whether the Ninth Circuit, by conducting a factual review for prejudice which did not consider counsel's use of the trial court's instructions, and gave limited consideration to other matters of context related to the jury's interpretation of the questioned instruction, conflicts with the test for consideration of instructional error stated in *Cupp v. Naughten*, 414 U.S. 141 (1973), and with authority from other Circuits on this point?

IV. Whether the Ninth Circuit, by replacing the conclusions of law and fact expressed by the Appellate Division of the District Court of Guam with its own such conclusions, without according any deference to either set of determinations, conflicts with the deferential review doctrine expressed in *Bonet v. Texas Company*, 308 U.S. 463 (1940), and violates Congress' mandate to the Appellate Division contained in 48 U.S.C. § 1424-3, to such an extent that it is a departure from the accepted course of Judicial proceedings that calls for the exercise of the Supreme Court's supervisory power to correct it?

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PETITION FOR WRIT OF CERTIORARI

The Territory of Guam ("Guam") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reviewed a judgment of the Appellate Division of the District Court of Guam which had affirmed the judgment of conviction, for aggravated murder and related offenses, as to all the named respondents. The Ninth Circuit reversed the convictions. It did so because the trial judge advised the jury that a statement of law presented by defense counsel, which propounded a form of the two-inference definition of reasonable doubt, was "inaccurate". The Ninth Circuit's decision was based on the conclusion that the two-inference formulation of reasonable doubt correctly expresses the law of that Circuit. After preliminarily determining that the trial judge's remark was error the panel found prejudice using a "reasonable possibility" test for such.

In doing so the Ninth Circuit panel apparently ignored certain facts, some of which had led the Appellate Division to conclude there was no prejudice in the trial judge's comment. In finding prejudice, the panel rejected the Appellate Division's conclusion to the contrary, as well as various factual assessments that had led to that conclusion, with no indication of deference to the Appellate Division's determination of fact or law. The Ninth Circuit's decision undermines Guam's judicial system, and consequently, its independent government.

OPINIONS BELOW

The unpublished order of the Ninth Circuit denying rehearing, and which amends its prior decision in this matter, is reproduced in Appendix A. The unpublished memorandum decision reversing the judgment of conviction is set out at Appendix B. The unpublished opinion of the District Court of Guam is reproduced at Appendix C. The Judgment of conviction entered in the Superior Court of Guam is set forth in Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 16, 1993. Petitioner timely submitted, under a grant of extension, a Petition for Rehearing on January 20, 1993, which was denied in an order dated February 24, 1993. The Ninth Circuit's exercise of jurisdiction below was based upon 48 U.S.C. § 1424-3(c). The Appellate Division of the District Court of Guam had jurisdiction by virtue of 48 U.S.C. § 1424-3(b). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The principle statutory provision involved is the Organic Act of Guam, 48 U.S.C. §§ 1421-1428, which establishes a civilian government with an independent court system for the Territory of Guam. The text of §§ 1424, 1424-1, 1424-2 and 1424-3, governing Guam's judiciary, is set out in Appendix E.

Section 90.23 of Criminal Procedure Code of Guam states:

§ 90.23. Reasonable Doubt: Defined; May be Read to Jury Verbatim.

(a) Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge."

(b) In charging a jury, the court may read Subsection (a) to the jury and no further instruction defining reasonable doubt need be given.

STATEMENT

The three Defendants, named as Respondents in this Petition, were indicted in the Superior Court of Guam on June 1, 1989 for multiple counts of aggravated murder and for robbery, burglary and the possession and use of a deadly weapon in commission of a felony. The first trial conducted in this matter proceeded from March 19, 1990 through April 17, 1990. It ended in a mistrial[1].

The issues presented arise from the second trial which began on July 9, 1990. They pertain to the jury instructions provided by the trial court on reasonable doubt. Some background on the proceedings of the case are essential to an understanding of the instructions' context. Of special importance was the prosecution's reliance on direct, as opposed to circumstantial, evidence.

The government's theory, as supported by testimony at trial, was generally as follows: The defendants, along with two others, had entered the home of a Carlos Bossi and Mari Tanaka, in Old Perezville, Guam, on the night of November 8, 1986 for the purpose of robbing the couple. While there the defendants had threatened

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[1] The jury, after returning to the court with verdicts of guilty, was polled. One of the jurors indicated that the verdict read was not her verdict. Thereafter, the panel was unable to reach unanimity.

and beaten the two residents to get them to open a safe which was on the premises. The victims were unable, under the stress of the circumstances, to open the safe. The robbery was aborted after those involved received indications, via police band radio, that police were on the way. Both residents of the house were killed by the defendants and their accomplices before the robbers fled.

At trial the fact and general circumstances of the Bossi and Tanaka homicides were largely uncontested. The issue litigated was that of identity. The Territory of Guam used direct evidence to establish its case. This included eyewitness testimony from two cooperating witnesses who had admitted involvement in the killings and testified as to the participation of all three defendants[2]. A John Nahalowaa, who had been involved with transporting a vehicle for use after the murders, but who was never charged criminally, placed the two cooperating witnesses and the three defendants together at the time of the crime. There was also corroborative testimony from others that served to confirm the eyewitness accounts.

At the conclusion of the trial the court instructed the jury on the law. In charging the jury on the meaning of reasonable doubt, the court read the provisions of § 90.23(a) of Criminal Procedure Code of Guam, as is expressly authorized by § 90.23(b) thereof. There was no objection to this instruction by any defense counsel. There was no request made for any other instruction on reasonable doubt.

Closing arguments followed. During his argument, counsel for Defendant Manibusan presented to the jury a chart which listed various legal doctrines which counsel told the jury it must apply in this case. One of these "instructions" apparently defined reasonable doubt in terms of the two-inference rule, which advises jurors to resolve inferences that support conflicting hypotheses in favor of the accused. The trial court, recognizing that the definition that counsel was presenting on "reasonable doubt" was not that which had been

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[2] It should be noted that one of these, Joseph Manibusan, who was the brother of one defendant and the cousin to another, provided different testimony at this trial than he had previously. However, his prior testimony was introduced as substantive evidence and his later version was thoroughly impeached with that and other material. In any event, his change in testimony does not change the fact that the government's proof was through the direct evidence of eyewitnesses.

instructed upon, stopped counsel's argument. The judge then instructed the jury, by reference to an item on counsel's chart, that "counsel's number 4 is an inaccurate statement of the law".

The trial judge did not indicate to the jurors what the inaccuracy was. Counsel for Defendant Manibusan did not make his chart an exhibit. Neither he, nor any of the other defense counsel present, read the wording of "number 4" into the record, or took any other steps to preserve its specific contents for review.

The defendants were subsequently found guilty of aggravated murder, and sentenced to life imprisonment without parole. On appeal, all three defendants claimed, among other things, prejudicial error in the trial court's comment regarding the counsel's presentation of the two-inference rule.

The Appellate Division of the District Court of Guam held that counsel's characterization of the law, which the Appellate Division found similar in substance to *California Jury Instruction (CALJIC)* 2.01, ¶¶ 3-4 (5th Ed. 1988), was "not incorrect as a matter of Constitutional law, [but] was not the approved jury instruction for this jurisdiction or one submitted for this trial." [Appendix C at 27a (citation omitted)]. After reviewing the factual circumstances of the instructions and closing arguments, the Appellate Division found that the trial court's negation of the two-inference instruction was without prejudice in the context of this case. It similarly found that defense counsel's conduct, in arguing to the jury an instruction which had not been approved by the court, was the direct cause of the court's interruption of counsel's argument and the instruction countering counsel's representation.

In its review, the Court of Appeals held that the two-inference instruction <u>was</u> a correct expression of Ninth Circuit law and that the trial court's instruction neutralizing it was clear error. It defined the issue before it as limited to whether the error was harmless. The panel reviewed the error under a "reasonably possible" standard for harm. Its opinion gives no indication that it considered various factors which the Appellate Division found dispositive to the contrary. It implicitly and explicitly overrode various findings which the Appellate Division had reached, some without discussion. There is no indication in the opinion that any form or degree of deference was accorded the Appellate Division's conclusions of fact or law.

The Territory of Guam petitioned for a rehearing on the basis that the Ninth Circuit had applied the wrong body of substantive law in reviewing the challenged instruction. The court of appeals denied the petition, re-emphasizing that the two-inference instruction is substantively correct and that the trial judge's phrasing of his countering instruction was prejudicial in effect.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S ACCEPTANCE OF THE "TWO INFERENCE" DEFINITION OF REASONABLE DOUBT, AS AN ACCURATE EXPRESSION OF CIRCUIT LAW, CONFLICTS WITH THE HOLDING OF *HOLLAND V. UNITED STATES*, 348 U.S. 121 (1954), AND WITH VARIOUS CIRCUITS' CONSTRUCTION OF *HOLLAND*.

It is clear from the Ninth Circuit's memorandum decision of December 16, 1992 that it's finding of error was based on the conclusion that Ninth Circuit law[3] holds the two-inference instruction to be inherently valid. (Appendix C at p. 4a). It began its analysis essentially as follows:

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[3] There is no question but that the Ninth Circuit panel erred first when it selected Ninth Circuit law as the appropriate benchmark. A prior *en banc* decision of the Ninth Circuit establishes that Guam incorporated the substance of California's law on reasonable doubt by adopting, essentially verbatim, California's statute defining the concept. *See Guam v. Yang*, 850 F.2d 507, (*en banc*) (9th Cir. 1988). A panel decision following *Yang* reiterated that conclusion. *Guam v. Ibanez*, 880 F.2d 108 (9th Cir. 1989), *cert. den.* 496 U.S. 130-31 (1990). Based on California's caselaw, Guam's law would require a "two inference instruction" where the proof is predominantly circumstantial, but proscribes such where, as here, the proof is direct. *People v. Gould*, 54 Cal.2d 621, 7 Cal. Rptr. 273, 277, 354 P.2d 865 (*en banc*) (1960). More recently the California Supreme Court held that where the prosecution does not "'substantially rely' on circumstantial evidence to prove [the] defendant guilty", defense requests for the two-inference instruction are properly denied by the court. *People v. Wright*, 276 Cal.Rptr 731, 755-56 (Cal. 1990). This case was based, as the Ninth Circuit panel noted, on accomplice testimony. (Appendix B at p. 5a, n.2).

> [Counsel's] argument reflected the "two inference instruction," which, although criticized, is a correct statement of Ninth Circuit law. The only question is whether the court's error was harmless.
> (*Id.*)(citations omitted)(footnote omitted)

The two inference instruction is not an accurate instruction on reasonable doubt. It has been criticized by this Court, various Circuits of the Court of Appeals, and by commentators. This Court stated in *Holland v. United States*, 348 U.S. 121, 137-38 (1954) that an instruction of this type is "confusing and incorrect" and should not be given where, as here, the jury has otherwise been properly instructed on reasonable doubt. There is substantial authority for the proposition that the two-inference instruction is not only confusing but actually dilutes the concept of reasonable doubt, by encouraging jurors to engage in a balancing test more akin to a preponderance of the evidence test. *See, e.g. 1A Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions* 4.01 at 4-15 (1992) (cited by the Ninth Circuit panel in both its memorandum (Appendix B at 4a) and its order denying rehearing (Appendix A at 2a)).

There is substantial disapproval of the two inference instruction in other Circuits, which appear to follow *Holland* with some degree of consistency[4]. Even within the Ninth Circuit, the weight of authority appears to go against the position taken by the panel of the

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[4] Representative examples of cases which follow *Holland* in approving the refusal of a two-inference type instruction, include the following: *United States v. Coombs*, 464 F.2d 842, 843 (D.C. Cir. 1972), *Taglianti v. United States*, 398 F.2d 558, 568 (1st Cir. 1968), *United States v. Warren*, 453 F.2d 738, 745 (2nd Cir. 1972), *United States v. Stubin*, 446 F.2d 457, 465 (3rd Cir. 1971), *United States v. Hildreth*, 387 F.2d 328, 329 (4th Cir. 1967), *United States v. Haggins*, 565 F.2d 1009, 1012 (5th Cir. 1977), *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984), *United States v. Fryer*, 419 F.2d 1346, 1350 (8th Cir. 1970), *Wall v. United States*, 384 F. 2d 758, 762 (10th Cir. 1967), and *United States v. Johnson*, 713 F.2d 633, 653 (11th Cir. 1983). The Seventh Circuit follows the practice of providing no definition of the term "reasonable doubt". *See, e.g. United States v. Hall*, 854 F.2d 1036, 1038-39 (7th Cir. 1988).

Court of Appeals below[5]. While the panel cites a series of cases which it indicates to establish the legitimacy the two-inference instruction, (*See* Appendix A, p. 2a) these appear to be cases where the validity of the instruction itself was not litigated[6].

While there is some validity in the two-inference instruction under Guam law, it is a misleading and inaccurate definition of reasonable doubt in this context and cannot justify the Ninth Circuit's application of the doctrine, which it based on its supposed general acceptance within the Circuit[7]. The Ninth Circuit considered the

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[5] *See*, *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969). There the defense had requested an instruction which would have required that circumstantial evidence "exclude every hypothesis but that of guilt". *Id.* at 1240. The panel noted first that the Supreme Court in *Holland v. United States*, 348 U.S. 121 (1954), had criticized a similar instruction and then interpreted *Holland* as indicating that no distinction is to be drawn between circumstantial and direct evidence when considering reasonable doubt. The *Nelson* court also indicated that no guidance beyond the basic definition of reasonable doubt was necessary or appropriate, and stated that the rule adopted from *Holland* was consistent with prior Ninth Circuit caselaw. *Id.* at 1241-43. Numerous cases follow *Nelson* in the Ninth Circuit, including *United States v. Heck*, 499 F.2d 778, 790 (9th Cir. 1974) and *United States v. Sukumolachan*, 610 F.2d 685 (9th Cir. 1980). *See also*, *Sablan v. Guam*, 434 F.2d 837, 839 (9th Cir. 1970) (applying the holding in *Nelson* to a context where the sufficiency of the evidence is considered).

[6] The panel cites *United States v. James*, 576 F.2d 223, 227 as establishing that the two-inference instruction accurately describes reasonable doubt. While the *James* decision concededly rejects a challenge to such an instruction, that decision does not address the propriety of the instruction in itself. James' attack on the jury charge was repelled first because he failed to properly request the desired instruction, *Id.* at 226, and foremost because the instruction given substantially expressed what he had requested "We believe the substance of James' desired instruction was more than adequately given". *Id.* at 227. The decision passes over, not upon, the relative merits of such an instruction. The two other decisions cited by the panel go no further than *James*. *United States v. Grayson*, 597 F.2d 1225, 1230, (9th Cir. 1979), declined to find error in a trial court's refusal to give the two-inference instruction in view of the other instructions already provided, although it suggested, in *dicta*, that the trial judge would have had the discretion to do so. In *United States v. Miller*, 688 F.2d 652, 662 (9th Cir. 1982) the panel, without in anyway endorsing the content of the two-inference instruction, approved its rejection by the trial judge.

[7] *See* note 3, at p. 6, *supra*.

correctness of the "two-inference" instruction in a vacuum, without concern for the factual context in which defense counsel sought it and the court rejected it. The Court of Appeals was apparently unwilling to consider whether this instruction would be inaccurate or misleading in a case resting squarely on direct evidence[8].

The decisions confronting the two inference instruction generally do so in the context of circumstantial evidence. (*See, e.g. United States v. Grayson*, 597 F.2d 1225, 1230, (9th Cir. 1979); *United States v. Miller*, 688 F.2d 652, 662 (9th Cir. 1982); *United States v. James*, 576 F.2d 223, 227. *See also, Holland v. United States*, 348 U.S. 121, 137-38 (1954)). This was not a case that dealt with such proof to any substantial degree. The Ninth Circuit acknowledged that the government's case was developed primarily through accomplice testimony (Appendix B at 5a, n.2), which would obviously be direct evidence, yet it found prejudice on the basis that the instruction given "suggested to the jury that if torn between two equally reasonable hypotheses it could still convict" (*Id.*) (emphasis added).

The two-inference instruction has been widely criticized even in the context where it bears the most logical relevance to the application of the reasonable doubt standard: in situations where the jury is asked to draw inferences from circumstantial evidence. However, here, in a case which was presented through direct evidence, it was grossly misleading, and inaccurate. *See, e.g. People v. Jernan*, 29 Cal.2d 189, 197, 173 P.2d 805 (1946) (noting policy concerns behind limiting use of the two-inference instruction to include the danger of misleading and confusing the jury when a case consisting of primarily direct evidence is put before them.) A jury cannot be tasked with comparing "hypotheses", without circumstantial evidence and inferences to rest them on. Such an instruction misdirects the

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[8] However, the panel did label the prosecutor's comments, which indicated that the two-inference instruction applied only to circumstantial evidence, as erroneous. (Appendix B at 5a, n. 3). This indicates that the panel drew no distinction between the instruction in one context or the other.

attention and comprehension of the jury in all cases where the issues for decision rest on direct evidence[9].

The Ninth Circuit based its assessment of error using substantive law which conflicts with this Court's holding in *Holland v. United States*, 348 U.S. 121 (1954), and case authority following it across the Circuits. The Court should grant the writ in order to resolve the conflict and to specifically clarify when, if ever, the "two-inference" test is valid.

II. THE REASONABLE POSSIBILITY TEST APPLIED BY THE NINTH CIRCUIT IN DETERMINING PREJUDICE DIRECTLY CONFLICTS WITH DECISIONS OF THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUIT COURTS OF APPEALS, AS WELL AS WITH THE AUTHORITY OF THIS COURT IN *BOYDE V. CALIFORNIA*, 494 U.S. 370 (1990).

The Ninth Circuit expressly reviewed the record using a "reasonably possible" test to determine whether the questioned instruction was prejudicial. (Appendix B, p. 4a). This standard,

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[9] There are indications in the record that counsel for Defendant Manibusan deliberately sought the two-inference instruction to use in a misleading manner. It was apparently used to leverage an argument that the jury could compare, as two competing scenarios, the government's evidence of the case and that reflected in statements made by a Cathy Burger and "Person A" (James Leon-Geurrero). *See* Appendix C at 17a (quoting counsel's argument as it related to the two-inference instruction: Counsel first tells the jury the two-inference instruction applies where "you look at different sets of facts" and then he goes on to suggest as a possible line of thought for the jurors during deliberation:

> "'And I listened to the statements made by Cathy Burger and the person labelled "A", and it is reasonable that maybe [the Defendants] didn't do it". You don't have a choice. You have to come back with a not guilty verdict. So when you're given a choice between two and they're both reasonable you have to come back with a not guilty verdict.")

This was misleading because the statements of Cathy Burger and "Person A" were found to be unreliable hearsay and admitted into evidence for the limited purpose of impeachment. *C.f.* Appendix C at 16a (discussing the admission of certain hearsay statements for impeachment alone). An argument that used the two-inference model to have these statements compared with the government's case as competing reasonable hypotheses would appear to be a calculated abuse of the instruction.

which appears questionable generally[10], is not applicable to the issue at bar. The proper standard is whether it is "reasonably probable" that the instruction in question prevented the jury from properly applying the reasonable doubt standard to its deliberations. *See Boyde v. California*, 494 U.S. 370, (1990) (holding, in the context of a habeas corpus review, that an ambiguous instruction bearing on the defendant's Eighth Amendment rights in a death penalty case would be reviewed for a "reasonable likelihood" of prejudice)[11].

The *Boyde* standard is appropriate because the instruction at issue, rather than being erroneous in substance, was ambiguous. The trial court explicitly instructed the jury verbatim with Guam's statutory definition of reasonable doubt. (Guam Criminal Procedure Code at § 90.19(a)). This was a proper and sufficient explanation which apprised the jury of the high standard to which the evidence must be held. *C.f. Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988) (*en banc*) (holding that Guam courts must instruct on reasonable doubt using this language). Only after defense counsel presented an unauthorized and misleading definition of reasonable doubt to the jury did the court intervene to state that counsel's "number 4 is an inaccurate statement of law". The trial court's comments were not in substance incorrect because it was proper to remove the two-inference instruction from the jury's consideration[12].

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[10] The standard applied here was drawn from a dubious line of Ninth Circuit cases which holds that instructional errors in criminal proceedings are always reviewed for a "'reasonable possibility'" that the error materially affected the verdict." Appendix B at 4a. (emphasis in original), *citing* to *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977) (which actually indicates that there is uncertainty in the Circuit as to the appropriate standard of review) and *United States v. Rubio-Villareal*, 967 F.2d 294, 296 n.3 (9th Cir. 1992).

[11] *See also, Estelle v. McGuire*, __U.S.__, 112 S.Ct. 475, 482, __L.Ed2d. __ (1991). (citing *Boyde* for the proposition that "in reviewing an ambiguous instruction . . . we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.")

[12] The Ninth Circuit panel appears to acknowledge this much in its decision denying rehearing. Appendix A at 2a.

Because the court indicated simply that it was inaccurate, without elaboration, there was no affirmative indication to the jury of how "number 4" should be regarded, except to be simply ignored (which was apparently the court's intention). While ambiguous, the natural effect of the court's instruction would have been to cause the jurors to rely on the explicit definition of reasonable doubt which the court had already provided.

The specific contents of the trial court's instruction on this point remains ambiguous on appeal. The court's comments, which incorporated by direct reference the content of defense counsel's written "instruction", are not known in detail because counsel did not preserve it for the record[13].

Any possible prejudice must flow from ambiguity. Thus *Boyde, supra*, expressly carves out a distinct standard of review for ambiguous instructions, must apply. In *Boyde v. California*, 494 U.S. 370, (1990), this Court reviewed for prejudice an instruction that advised jurors how to consider mitigating circumstances in sentencing the defendant to life or death. The instruction indicated simply that the jury could consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime". (494 U.S. 370, _____, 110 S.Ct. 1190, 1194.) *Boyde* claimed that the instruction "did not allow the jury to consider mitigating evidence of the defendant's background and character". (*Id.* at 1195.) This Court first resolved that the instruction was not in itself incorrect and went on determine that "reasonable likelihood" of prejudicial effect was the appropriate standard of review.

In *Estelle v. McGuire*, __ U.S.__, 112 S.CT. 475, 482, n.4, __L.Ed. 2d__, the Court reaffirmed its commitment to the standard set forth in *Boyde*, expressly overruling inconsistent tests for

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[13] Because the court's interjection was directed to the content of "number 4" specifically, and counsel for the defense chose not to make the phrasing of "number 4" a part of the record, the import of the court's guidance to the jury is made all the more uncertain and ambiguous for the purposes of appeal. It was incumbent on defense counsel to preserve this. *See, e.g. United States v. Wilson*, 904 F.2d 656 (11th Cir. 1990), *cert. den.* __U.S.__, 1112 S.Ct. 250, 116 L.Ed2d 205 (1990) (indicating that the obligation is on appellants to ensure that an adequate appellate record is compiled).

prejudice that were stated in two cases that had followed it: *Cage v. Louisiana*, 498 U.S. __, 111 S.Ct 328, 112 L.Ed.2d 339 (1990) and *Yates v. Evatt*, 500 U.S.__, 111 S.CT. 1884, 114 L.Ed. 2d 432 (1991). *McGuire* indicated that *Boyde* was to be broadly interpreted. 112 S.CT. 475, 482, n.4 (citation omitted).

Consequently, there is inconsistency in the manner in which the Circuits have applied *Boyde* under *McGuire*; specifically as to whether the "reasonable likelihood" test is intended for all claims of instructional error or only those presenting ambiguity, and whether the standard is employed in direct federal appeals as well as in reviewing state judgments in habeas proceedings[14].

The Fourth Circuit, in *United States v. Craigo*, 956 F.2d 65 (4th Cir. 1992), applies the standard in a direct appeal from a district court judgment. *See also*, *United States v. Cobb*, 905 F.2d. 784 (4th Cir. 1990) (same). *Craigo* also indicates a willingness to apply the standard, not only where the instruction is ambiguous, but also where it is "clearly error". 956 F.2d at 67. The District of Columbia Circuit has applied the rule in the context of a direct appeal, *United States v. Merlos*, 984 F.2d 1239, 1241 (D.C. Cir. 1993). In that case it termed the questioned instruction, which defined reasonable doubt in terms of the jurors' "strong belief", as ambiguous. (*Id.*) The Third Circuit, which has not yet addressed the issue in the context of a direct federal appeal, has suggested that it may apply the *Boyde* standard to all claims of instructional error, ambiguous or otherwise. *Rock v. Zimmerman*, 959 F.2d 1237, 1247, n. 3 (3rd Cir. 1992). The Eighth Circuit has so far found the standard to be applicable to ambiguous instructions. *Karras v. Leapley*, 974 F.2d 71 (8th Cir. 1992).

The Ninth Circuit has applied the *Boyde* test but only in a case involving habeas review and there to an instruction termed ambiguous. *See Jeffries v. Blodgett*, 974 F.2d 1179, 1193 (1992). In

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[14] Some Circuits, such as the Second have not addressed the issue. Both the Fifth and Eleventh Circuits have acknowledged *Boyde* without having occasion to apply it's holding. *See Wilkerson v. Collins*, 950 F.2d 1054, 1060 (5th Cir. 1992) and *Stephans v. Zant*, 968 F.2d 1076, 1086 (11th Cir. 1992). *See also*, *Hill v. Maloney*, 927 F.2d 646, 651 (1st. Cir. 1990) (applying *Boyde* in a factually analogous setting).

United States v. Koshnevis, 979 F.2d 691 (9th Cir. 1992) and *United States v. Velasquez*, 980 F.2d 1975 (9th Cir. 1992) the Ninth Circuit did not apply *Boyde*. *Koshnevis* was a direct appeal involving a challenge to a jury instruction which permitted the jury to draw an inference of possession if they found certain facts. The issue is similar to that in *McGuire*, *supra*, except that the Ninth Circuit applied a "reasonable possibility" test, based on *United States v. Rubio-Villareal*, 967 F.2d 294 (9th Cir. 1992), and determines after a predominantly factual analysis of the record, that there was no prejudice.

In *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992) the Ninth Circuit reviewed, on direct appeal, a challenge to a jury instruction which defined proof beyond a reasonable doubt as "proof 'that leaves you firmly convinced'". In affirming the conviction the panel applied neither the *Boyde* test of "reasonable likelihood" nor the test of "reasonable possibility", instead simply holding that a definition of reasonable doubt using "firmly convinced" as an evidentiary standard was not erroneous.

Boyde's test of reasonable likelihood should have been applied to the case at bar, rather than the "reasonable possibility" test advanced in *Rubio-Villareal*. The instruction at issue here, which advised the jury that a confusing statement of law presented by counsel was inaccurate, but did not describe in what manner, can only be considered erroneous through ambiguity[15].

Although the present case was considered by the Ninth Circuit on direct appeal, *Boyde* is not properly limited to proceedings on habeas petitions. At least two Circuits of the Court of Appeals have interpreted *McGuire* as extending *Boyde* to ambiguous jury instructions

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[15] As discussed above the Ninth Circuit panel does appear to label the instruction substantively defective under Ninth Circuit law. However, it has been shown that Ninth Circuit law is inapposite to the question and that, in any event, the panel's construction of Ninth Circuit law is erroneous.

on direct appeal as well as in habeas proceedings[16]. The language used by the Court in both *Boyde* and *McGuire* support the conclusion that these Circuits are correct in doing so.

When this Court adopted the "reasonable likelihood" test in *Boyde* it made reference to other legal contexts where that standard had previously been used. 494 U.S. at 370, __, 110 S.Ct. 1190, 198, n.4, __L.Ed.2d__. The discussion there identifies various Constitutional violations; such as ineffective assistance of counsel, the prosecutor's suppression of exculpatory evidence, etc.; where "reasonable likelihood" of prejudice is the standard which a criminal defendant must meet to obtain relief[17].

The logical underpinnings of the *Boyde* test, as expressed there, support its application in all instances where an ambiguous instruction is in issue. The impact of an ambiguous instruction is necessarily speculative. As this Court noted in *Boyde*:

> The 'reasonable likelihood' standard . . . better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction.

Estelle v. McGuire, __U.S.__,112 S.Ct. 475, 482, n. 2 __L.Ed.2d__ (1991) supports even broader application of the *Boyde* test; expressing it in terms that seem intentionally far-reaching: "In

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[16] In *United States v. Merlos*, 984 F.2d 1239 (D.C. Cir. 1993) the D.C. Circuit applied the *Boyde* test, to a direct appeal from a district court judgment, to determine whether there was error in a reasonable doubt instruction which used the term "strong belief" as a benchmark. In two instances the Fourth Circuit has applied the *Boyde* standard in affirming judgments on direct appeal. *See United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990) and *United States v. Craigo*, 956 F.2d 65 (4th Cir. 1990).

[17] *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d. 1193 (1982) (applying reasonable likelihood to question of whether due process is violated by deportation of defense witnesses prior to trial) and *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (applying reasonable probability of prejudice test to prosecution's alleged suppression of evidence).

Boyde . . . we made it a point to settle on a single standard of review for jury instructions—the "reasonable likelihood" standard—after considering the many different phrasings that had previously been used by this Court." (Citation omitted). After *McGuire*, in which the Court went to considerable lengths to establish what appears to be a single standard, the *Boyde* test would arguably apply to the review of all jury instruction alleged erroneous.

In *Holland v. United States*, 348 U.S. 121, 140 (1954), this Court recognized a distinction, for purposes of review, between instructions causing "confusion" and those leading to "misapprehension". *Boyde* expressly established that ambiguous instructions, are to be reviewed for a "reasonable likelihood" of prejudice. The Ninth Circuit, which has indicated in recent opinions that it will always apply a "reasonable possibility" test when reviewing jury instructions for error[18], has rejected this distinction. The District of Columbia and Fourth Circuits have embraced it. This Court should grant certiorari to address apparent conflict between the Ninth Circuit, and the District of Columbia and the Fourth Circuits, respectively, as to the appropriate application of the *Boyde* test.

III. THE FACTUAL REVIEW CONDUCTED BY THE NINTH CIRCUIT IN THIS MATTER CONFLICTS WITH THE STANDARD SET FORTH IN *CUPP V. NAUGHTEN*[19], BECAUSE THE PANEL BELOW FAILED TO CONSIDER ALL MATTERS IN THE RECORD BEARING ON THE JURY'S INTERPRETATION OF THE QUESTIONED INSTRUCTION.

Cupp v. Naughten, 414 U.S. 141, 147 (1973) cites *Boyd v. United States*, 271 U.S. 104, 107 (1926) to reiterate the rule that questioned jury instructions must be evaluated for prejudice in the context of the entire charge. *Cupp* is routinely cited for this proposition not only in habeas proceedings but on direct appeals. *See, e.g. United States v. Bordallo*, 857 F.2d 519 (9th Cir. 1988). A reading of *Cupp* however, indicates that it requires that the

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[18] *United States v. Rubio-Villareal*, 967 F.2d 294, 296-97 (9th Cir. 1992) and *United States v. Koshnevis*, 979 F.2d 691, 696 (9th Cir. 1992).

[19] 414 U.S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d. 368 (1973).

challenged instruction be placed in the context of the entire trial. The rule does "recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp*, 414 U.S. at 147. It would appear to indicate that, at the very least, all matters in the record that bear a logical relationship to the jury's interpretation of the instructions should be considered in determining its harmfulness.

Regardless of how *Cupp* is construed it appears certain that the Ninth Circuit's factual review so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In determining that the trial court's statement to the jury, that "counsel's number 4 is an inaccurate statement of law", was prejudicial, the panel essentially ignored the fact that the counsel in question did not preserve the content of his "number 4" so that any prejudice in the court's comment could be clearly discerned. The Court of Appeals found that the content of counsel's written chart was sufficiently preserved from the argument on record that counsel made from it[20]. Given that the court's counter to counsel's "instruction", was to negate it in its own terms (by reference to its number on the chart) it would appear that the wording of "number 4" is of considerable importance. The determination of prejudice from a jury instruction requires "careful attention to the words actually spoken to the jury". *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). Where those words incorporate a written illustration by reference such that they are meaningless without that reference, the absence of such an illustration is obviously of great consequence, and should not be overlooked.

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[20] Appendix B, at p. 4a, n. 1: "We reject the States's contention that this claim was not properly preserved for appellate review. Appellants did not make a record of the counsel's exact statement as written on a courtroom blackboard, but the substance of counsel's statement was repeated to the jury and recorded in the trial transcript." It is worth noting first that the medium used by counsel to present his written statement of the law was noted by the Appellate Division simply to be a demonstrative chart (Appendix C at p. 17a) and there is no indication in the record that counsel's was using a "courtroom blackboard" rather than a posterboard of his own. While this may seem a minor point, it is significant in the sense that the Ninth Circuit appears, in this and other matters here, to go out of its way to excuse the defense counsel's contribution to both the error raised, and the difficulty in reviewing it.

The Ninth Circuit's memorandum decision silently ignores several facts which the Appellate Division found to be of major consequence in finding that no prejudice obtained. Most notable among these was that, following the trial court's interruption of Counsel for Defendant Manibusan, and the interjection of the challenged instruction, all counsel went on to explain reasonable doubt to the jury. (Appendix C at 27a). Under *Cupp v. Naughten*, *supra*, this would be worth noting in any case. But in this situation it had special significance. According to the Ninth Circuit's decision the trial judge's remark had a devastating effect because it was made during closing argument. (Appendix B at 5a). The trial judge interrupted defense counsel *sua sponte* to correct a point of law which counsel had presented. It can be inferred that when the various counsel subsequently presented their explanations of reasonable doubt without interruption, that a reasonable jury would see these as being implicitly approved by the court.

The respective panels below assessed defense counsel's contribution to the error quite differently. The Appellate Division, in determining whether there was prejudicial error, found that the trial court's interjection of the questioned instruction was "invited" by defense counsel's presenting a nonapproved, improper definition of reasonable doubt. (Appendix C at 27a). The Ninth Circuit, in expressly overriding the Appellate Division's conclusion held that comments made by the prosecutor in rebuttal closing offset the defense counsel's misconduct. (Appendix B at 5a, n. 3) However, the prosecutor's "fault" went only so far as telling the jury that the two-inference instruction applied to circumstantial rather than direct evidence. (*Id.*) Furthermore, the Ninth Circuit's minimization of the invited error here is directly at odds with the Seventh Circuit's treatment of very similar case where the defense counsel, though perhaps less culpable, was held responsible for causing any instruc-

tional error[21]. It appears from the record that the Ninth Circuit conducted a factual review which ignored certain matters of significance, and minimized others.

The determination of prejudice in this case should have been a mixed fact-law question in which factual questions predominated[22]. *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984), defining the concept, by reference to *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), in terms of whether the issue is essentially factual in nature. Under *McConney* a district court's determination of such issues is subject to review for clear error only[23]. *Id.* at 1202-03. But there is no indication that the Ninth Circuit gave real consideration, much less deference, to the Appellate Division's factual conclusions.

It appears that the Ninth Circuit applied a limited factual review and rejected, without consideration, conclusions of fact reached by the appellate panel whose decision it reviewed. This does not meet

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[21] In *United States v. Glass*, 846 F.2d 386 (7th Cir. 1988), that court, which normally permits no instruction on the definition of reasonable doubt, dealt with a case where the district court, upon request from defense counsel, allowed argument on its meaning, but gave no instruction on it. The jury, confused, subsequently requested an instruction from the court on reasonable doubt, and the trial judge refused to provide any. In affirming the judgment of conviction the Court of Appeals noted that it was Glass' counsel who caused the problem by attempting to define reasonable doubt, holding him responsible even though he had obtained the prior approval of the court to argue the point.

[22] In this case the analysis employed by the Ninth Circuit applied a questionable Ninth Circuit doctrine which assumed error in the challenged instruction and then sought prejudice using a "reasonable possibility" test. However, the analysis should have hinged on a factual determination of the probable effect of the words used on a reasonable jury.

[23] There is admittedly a question as to whether the Ninth Circuit should treat the Appellate Division of the District Court of Guam, as a district court for the purposes of *McConney*. Here it is sitting as an appellate tribunal rather than trial court. However, *McConney* also speaks of concerns of judicial administration and indicates that the court best positioned to make factual or legal determinations should be that entrusted to do so. The Appellate Division, as the Appellate panel first reviewing alleged trial errors, should be given this role and its determinations reviewed for clear error.

the requirements of *Cupp v. Naughten*, *supra*. Under the circumstances of this case it is so extreme a departure from the accepted and usual course of judicial proceedings that this Court should grant the writ to exercise its powers of supervision to correct this error[24].

IV. THE MANNER IN WHICH THE NINTH CIRCUIT REVIEWED THE JUDGMENT OF THE APPELLATE DIVISION COMPLETELY NULLIFIED ITS ROLE IN GUAM'S APPELLATE PROCESS. THIS VIOLATES THE CONGRESSIONAL MANDATE PROVIDED THE APPELLATE DIVISION IN 48 U.S.C. § 1424-3 AND CONFLICTS WITH AN ESTABLISHED LINE OF DECISIONAL AUTHORITY OF THIS COURT[25]. THE COURT SHOULD GRANT THE WRIT TO CORRECT AN EXTREME DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS REFLECTED IN THIS MATTER.

As is discussed above, the Ninth Circuit Court of Appeals substituted its own body of substantive law for that of Guam in reviewing the correctness of the jury instruction in question. The panel reviewed this ambiguous instruction to determine, incorrectly, if it was "reasonably possible" that prejudice resulted from it. In conducting its review the Ninth Circuit panel also discounted, without serious consideration, the legal and factual conclusions

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[24] In this case the Ninth Circuit accorded no deference to the Appellate Division's review for prejudice and its finding that none existed, simply ignoring its reasoning for the most part. There are admittedly questions as to what deference the Appellate Division is due, since it sits as an intermediate appellate court in a specialized context. The manner in which the Ninth Circuit treats its own panels, when it sits *en banc*, strongly suggests some modicum of deference was due to the Appellate Division. *See, e.g., United States v. Rubio-Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (*en banc*) (remanding to three judge panel of Ninth Circuit to permit that court to consider whether, in light of legal determinations reached in the decision, the instructional error found was harmless).

[25] *See Bonnet v. Texas Company*, 308 U.S. 463, 470-71 (1940) -and cases cited therein. Holding that Territorial courts are to be accorded deference in determining issues of local law. *See also, Guam v. Olsen*, 431 U.S. 195, 204, n.10 (1977) (indicating that Guam's judiciary is to be treated like the judiciaries of the other Territories).

reached by the Appellate Division. The manner in which the review was conducted amounts to the nullification of the Appellate Division's role in Guam's Appellate structure. In this respect, the decision extends *Guam v. Yang*, 850 F.2d 507, 509-11 (9th Cir. 1988) (*en banc*). There, the Ninth Circuit resolved that it would no longer apply a standard of deferential review to the Appellate Division's determination of Guam's local law.

Prior to *Yang*, the Ninth Circuit would reverse the Appellate Division's interpretation of local law only if "clear and manifest error is shown" *Gumataotao v. Guam*, 322 F.2d 580, 582 (9th Cir. 1963) (citation omitted). After *Yang*, the review of such issues is *de novo*. 850 F.2d at 509-11. By this transition the Circuit not only departed from a long line of its own precedent, but from this Court's as well. *See, e.g. De Castro v. Board of Com'rs of San Juan*, 322 U.S. 451 (1944) (requiring clear and manifest error before federal appellate courts reverse Territorial courts on matters of local law) and *Bonnet v. Texas Company*, 308 U.S. 463, 471, (1940) ("To justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous").

The Ninth Circuit's rejection of the rule was based on a three-fold rationale: That only one of the judges sitting on the Appellate Division in that case was a "local" judge; that a previous Ninth Circuit case; *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984) (*en banc*), resolved that decisions of district court judges interpreting state law are reviewed *de novo*, and because the Third Circuit had concluded, in *Saludes v. Ramos*, 744 F.2d 992 (3rd Cir. 1984), that it would not give deference to the similarly structured Appellate Division of the District Court of the Virgin Islands. *Yang*, 850 F.2d at 509-11.

The *Yang* Court's reasoning on these points was not well supported[26]. The *Saludes* case did not present an actual conflict because the panel there relied upon a factor not present in Guam's circumstances. In rejecting deferential review for the Appellate Division of the District Court of the Virgin Islands, the panel emphasized that because the Virgin Islands has left a substantial portion of local original jurisdiction to the District Court "it is frequently the District Court in the Virgin Islands that serves as the trial court and interprets law in the first instance". 744 F.2d at 994[27]. In fact, *Saludes* appears to have been just such a case, where the trial court had been the District Court of the Virgin Islands. Guam, though having a similar jurisdictional statute, does not share this situation[28].

The Third Circuit also based its rationale on a reading of Supreme Court authority which restrictively interpreted it as applying the deference rule only to those Territories having insular courts. *Saludes*, 744 F.2d at 993-94. As is discussed below, this Court's deferential review is based on policy which has equal application to courts such as the Appellate Division of Guam, which "wear two hats" so to speak.

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[26] The Yang decision is otherwise questionable in its reasoning. The Circuit, clearly using its supervisory authority, reversed the judgment of conviction because the trial court had given a definition of reasonable doubt based upon "hesitation to act" instead of Guam's statutory definition of "moral certainty". This reversal was done without a review for harmless error, despite a requirement clearly expressed for such in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). The Ninth Circuit had, in previous (though unpublished) decisions, approved use of the challenged instruction in Guam's courts. *Yang*, 850 F.2d at 512, n.8. Though certiorari was not sought from this court in *Yang*, it was sought, and denied, in a subsequent case which expanded *Yang*'s effect. *Guam v. Ibanez*, 880 F.2d 108, *cert. den.*, 496 U.S. 930-31 (1990).

[27] The panel cited to 48 U.S.C. § 1612, which reserves to the District Court such original jurisdiction as is not assumed through local legislation.

[28] While 48 U.S.C. § 1424(c) reserves residual jurisdiction for the District Court of Guam using similar language, in application it is apparently different because Guam, having enacted a complete set of codes dealing with criminal and civil matters has acted to divest the District Court of such original jurisdiction entirely. *See*, *Guam v. Olsen*, 431 U.S. 195, 197-98, nn. 3 and 4 and accompanying text (1977).

The *McLinn* decision, which *Yang* portrays as establishing that District Court judges should not be given deference in their determinations of local law, relied very heavily on the fact that these judges sit alone rather than in panels and that their determinations lack one of the major safeguards associated with appellate review:

> It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.

(*Matter of McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (quoting *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (*en banc*)).

That *McLinn*'s rationale does not apply to the Appellate Division, because it is a three judge panel, was expressly stated in a prior Ninth Circuit decision, *Brown v. Civil Service Com'n*, 818 F.2d 706, 708 (9th Cir. 1987). The *Yang* court failed to address that case law, as it failed to address the string of decisions of this Court which require deferential review of a Territory's determination of its own law.

In justifying its permanent shift to *de novo* review of the Appellate Division's interpretations of local law, the Ninth Circuit relied on the fact that the panel below included only one local judge, rather than the two which are permitted under the statutory scheme for its composition[29]. The *Yang* court stated that since a majority

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[29] One of the three judges on the appellate panel is the district court judge from Guam, 48 U.S.C. § 1423-3(b). Another is typically from the Northern Mariana Islands. *See S. Rep. No. 1582, 85th Cong., 2d Sess.* (1958), *reprinted in* 1958 *U.S.C.A.A.N. 2623; H.R. Rep. No. 951, 85th Cong., 1st Sess.* (1957) (stating that Congress' intent was that judges assigned to Guam's courts be from the general vicinity of Guam) Guam is geographically part of the Northern Marianas Islands and the two share a common culture, language and history. *See* Arnold Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 316, 521-22 (1989).

of the panel were outsiders, they lacked as a group, any presumptive expertise in the local law. (*Id.* at 510). The Ninth Circuit noted that even if an additional member of the panel were from the neighboring Northern Marianas Islands it would not affect this analysis. This remark reflects an oversight in the *Yang* Court's review of the deference standard's policy bases. The rule does not apply simply because a local judge may better know the local law, but because a judge situated in the locale may better understand the socio-economic context in which the law is applied. Given the similarities between Guam and the Northern Marianas a judge from there would have substantial expertise in understanding the application of Guam's law[30].

Prior decisions of the Ninth Circuit, applying the deference standard, acknowledged the broader policies for its application. In *Brown v. Civil Service Com'n,* 818 F.2d 706, 708 (9th Cir. 1987), a panel considered whether the deferential standard for its review of Guam's Appellate Division should survive *McLinn*. In holding that it did, *Brown* noted the court's previously stated justification that "'local Guam needs and customs may differ from those with which federal courts would otherwise be familiar. . . .'" (quoting *Laguana v. Guam Visitors Bureau*, 725 F.2d 519, 520-21 (9th Cir. 1984). *See also*, *Aguon v. Calvo*, 829 F.2d 845, 847 (giving deferential review on "matters of local law, custom or policy") and *Gumataotao v. Guam*, 322 F.2d 580, 582 (1963) (citing as basis of rule that "local needs, customs and legal systems may differ").

The policies discussed in Supreme Court opinions bearing on deferential review of Territorial courts indicate this standard was not

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[30] *See* n.29, *supra*. The case at bar presents an example of how an understanding of culture can make a difference in the application of local law. The Appellate Division noted in its opinion below that this appeal arose from a retrial after the first trial had ended with a hung jury. (Appendix C at 14a). However, that panel went on to note that in the first trial the jury had returned a guilty verdict, but that one juror when polled indicated that the verdict announced was not her's. (*Id.*) The Ninth Circuit cited the fact of a prior hung jury, without comment on these circumstances, as an indication that the evidence was insufficiently strong to make a serious error harmless. (Appendix B, at 5a, n.2). The Appellate Division, with at least one judge who was familiar with the effect that a close-knit island community may have on a juror being polled, was able to see some significance in how the jury became hung.

intended to apply solely to those Territories having their own insular courts. The rationales expressed are often similar to those addressed in the Ninth Circuit cases described above, which express concern for societal context. In *Diaz v. Gonzales*, 261 U.S. 102, 106 (1923), Mr. Justice Holmes, pointed out the profound influence that culture has in the interpretation of law in this context:

> When we contemplate [a system built on Spanish law] from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from books.

The passage above was quoted with both approval and emphasis in *Bonnet v. Texas Company*, 308 U.S. 463, 470, n. 17 (1940). Other decisions of this Court emphasize not only the importance of respecting the context in which law is interpreted but in permitting a body of case law to develop that is reflective of the community's own values and traditions[31].

Yang also failed to take into account Congress' intent in creating Guam's judiciary. *Yang* expressly stated that the Ninth Circuit is Guam's Supreme Court until such time as the Guam legislature

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[31] "'Orderly development of the Government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedures and tribunals of the Island.'" *Bonnet v. Texas Company*, 308 U.S. 463, 471 (1940) (quoting from *Sancho Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 510 (1939). *See, e.g. In re Sawyer*, 360 U.S. 622, 640 (1959) ("this Court and the Courts of Appeals must give the Territorial Courts freedom in developing principles of local law, and in interpreting local legislation").

creates one[32]. 850 F.2d at 510, n.4. However, this Court's opinion in *Guam v. Olsen*, 431 U.S. 195, 203, suggests that Congress intended the Appellate Division to serve that function:

> It was also envisioned that the district court would serve as an appellate body once local courts were established. The apparent reason for eliminating the provision for a local supreme court was to avoid duplicative judicial machinery. . . . (Quoting from, and expressly adopting, then Judge Kennedy's dissenting opinion in *Agana Bay Dev. Co. (Hong Kong) Ltd v. Supreme Court of Guam*, 529 F.2d 952, 961 (9th Cir. 1976).

In *Olsen* this Court considered whether § 22 of the 1950 Organic Act of Guam permitted the Guam Legislature to create a Supreme Court that could supplant the Appellate Division of the District Court of Guam. *Olsen* concluded that it could not because it found Congress had mandated a specific role for the Appellate Division which the Guam Legislature was not authorized, at that time, to eliminate. In reaching this conclusion the Court specifically noted that Congress had consistently provided procedures for review of Territorial Courts and that the available legislative history indicated that Guam was to be treated no differently. 431 U.S. at 203-04 (text at n.10).

The manner in which the Appellate Division came into being leaves no doubt that it is, by origin, a local appellate court. It was created in 1951, under the authority of the Organic Act, by the Guam Legislature through Public Law 17, which granted exclusive jurisdiction in certain matters to the Island Court of Guam, and provided that appeals from that forum would be heard by three-judge panels of the Appellate Division of the District Court of Guam. *Guam v. Olsen*, 431 U.S. at 197. Seven years later Congress amended § 22 of Guam's Organic Act to formally adopt the three-

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[32] Through Public Law 21-147 (signed into law Jan. 14, 1993), the Guam Legislature has enacted legislation that creates a Supreme Court for the Territory. However, the rules which will govern its procedures, and the persons who will act as its judiciary, have yet to be determined. The Ninth Circuit's treatment of the Appellate Division's decisions should not be discounted because of Guam's prospects for a functioning Supreme Court.

judge panel appellate division that Guam had fashioned, and defined the jurisdiction of that forum to be "such appellate jurisdiction as the [Guam] legislature may determine". Act of June 4, 1958, Pub. L. 85-444, § 1, 72 Stat. 178 (codified as amended at 48 U.S.C. § 1424-3). *See Guam v. Olsen*, 431 U.S. at 197; *Agana Bay Dev. Co. (Hong Kong) Ltd. v. Supreme Court of Guam*, 529 F.2d 952, 960 n.2 (9th Cir. 1976) (J. Kennedy dissenting). The Ninth Circuit continued to review final decisions of the Appellate Division. 48 U.S.C. § 1424-3(c).

Since the Appellate Division has been found the functional equivalent of Guam's Supreme Court, it must be accorded deference in its decisions as such under the line of cases reflected in *Bonnet v. Texas Company*, 308 U.S. 463, *supra*. The relevant legislative history indicates that, after 1984, Congress affirmatively intended that this deference be provided.

The Senate explanation of the 1984 amendment[33] to the judicial provisions of Guam's Organic Act referred to the Ninth Circuit's decision in *Camacho v. Civil Service Commission*, 666 F.2d 1257, 1262 (9th Cir. 1982) which applied a deferential review standard to a decision of the Appellate Division of the District Court of the Northern Mariana Islands. "'Interpretations of local law by a district court sitting in the locality are entitled to great weight. They will not be disturbed unless clearly wrong'" *Id.* (quoting *S.A. Empressa De Viacao Rio Grandense v. Boeing Co.*, 641 F.2d 746, 752 (9th Cir. 1981)). Congress equated the judicial system of the Northern Marianas to that of Guam. *See, e.g.* 130 Cong. Rec., at 23,791 and 25,746. *Compare* 48 U.S.C. §§ 1424 to 1424-3 *with* 48 U.S.C. §§ 1694-94c. The Senate explanation also indicates explicit awareness of, and sensitivity to, Guam's relationship with the Ninth Circuit as a reviewing appellate court. In discussing a transition period during which a future Guam Supreme Court would be subject to Ninth Circuit review, the Senate Committee notes the following:

> The Committee is aware of the long experience which Guam already has of having appeals taken to the Ninth

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[33] 48 U.S.C. § 1424-2 (originally enacted as Act of Oct. 5, 1984, Pub. L. 98-454, Title VIII, § 801, 98 Stat. 1742). The amendment authorizes, with some conditions, the Guam legislature to create a Supreme Court for Guam.

> Circuit from the district court of strictly local matters and the concern that a shorter transition period should be enacted. (130 Cong. Rec. at 23790)

The reference to *Camacho v. Civil Service Commission*, *supra*, and Congress' failure to modify that rule indicates "Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. University of Chicago*, 441 U.S. at 703). The Senate Committee's expressed knowledge of the manner in which Guam's "strictly local matters" are reviewed give substance to this presumptive inference.

It appears certain that the deferential review standard spelled out in *Bonnet v. Texas Co.*, *supra*, applies to the Ninth Circuit's review of the Appellate Division's decisions. Even if not, the review undertaken here by the Court of Appeals violates Congress' intended role for the Appellate Division, because it has been reduced essentially to a nullity. The review discarded, without regard, all significant determinations of fact and law on this issue. It is certain that Congress intended the Appellate Division to have a more significant part in the development of Guam's law.

This Court should exercise its supervisory authority to determine what standard of review must be accorded by the Ninth Circuit Court of Appeals to determinations of local law by the Appellate Division. Guam requires a consistently evolving body of case law to properly develop as a Territory. Litigants and trial judges need some sense that there is a developing body of law that remains consistent under appellate review. In order to obtain this there needs to be some degree of deference accorded by the Ninth Circuit to local determinations of

law[34] Guam's decisional law must be shaped in a forum that is institutionally geared to determining the law, customs and traditions of a pacific island community that was a Spanish colony less than one hundred years ago and a Japanese colony at half that[35].

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[34] *Yang* and its progeny illustrate the difficulty that Ninth Circuit review presents. Prior to that decision the Appellate Division was accorded deference and the Ninth Circuit approved Guam's use of a nonstatutory reasonable doubt instruction because it had been approved by the Appellate Division. *Yang*, 850 F.2d. at 511. In *Yang*, the court sitting *en banc* held that even though the defendant had not objected to the nonstatutory instruction his conviction would be reversed, in significant part because he had informally requested the statutory instruction. The *Yang* court emphasized that its holding was specific to the unique facts of the case. 850 F.2d at 512, n.9. In *Guam v. Ibanez*, 880 F.2d 108, 111 (9th Cir. 1989), *cert. den.* 496 U.S. 130-31 (1990), a panel of the Ninth Circuit extended the *Yang* rule to a case where the Appellant had not even requested the statutory instruction, much less objected to it. In the present case, which the Ninth Circuit decided on Dec. 16, 1992, the trial court instructed the jury using the statutory instruction required by *Yang*, and the Ninth Circuit panel deemed it defective under principles of Ninth Circuit law. Memorandum Decision of Dec. 16, 1992, at 2. *But C.f.*, *Guam v. Borja, et al.*, 983 F.2d 914 (9th Cir. 1993), affirming convictions where the appellants had failed to object to nonstatutory instruction, when jury instruction occurred after date that Ninth Circuit granted rehearing *en banc* in *Yang*. *Compare also*, *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992), upholding, over defendant's contemporaneous objection, a jury instruction which equated proof beyond a reasonable doubt with proof that leaves one "firmly convinced".

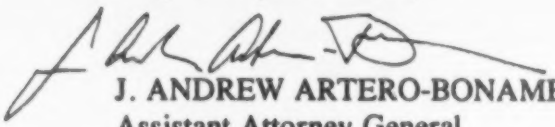
[35] Besides the need to have a forum that incorporates an understanding of local culture into its decision making, there are logistical problems that disadvantage the Ninth Circuit institutionally. The number of judges in the Circuit, in conjunction with district judges sitting by designation, virtually guarantees that the judicial mind brought to bear on a case, i.e. the particular combination of judges, will not recur when related cases are considered. This randomness is laudable and generally helps to ensure fairness by requiring panels to decide issues based on published precedent. However, it can be a kiss of death to cases from a jurisdiction like Guam, which has very little of its own published precedent and often presents issues as to what body of substantive law should be applied. The Ninth Circuit's treatment of Guam cases may also be impaired by the absence of procedural rules which would allow them to be processed in a manner procedurally distinct from the Ninth Circuit's usual fare. The Appellate Division of the District Court of Guam has a complete set of rules which defines its specialized role in Guam's appellate system. The Ninth Circuit has one rule that may arguably be considered specialized to this end. Ninth Circuit Rule 26-1 provides an extension of seven days to most filing deadlines, "in cases arising from the Districts of Guam and the Northern Marianas Islands". This

(continued . . .)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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[35](. . .continued)
would apparently include matters arising directly from the district courts. An example of an area where rules specialized to Guam would be appropriate is in Ninth Circuit rule 11-1.1 which provides that, in all cases, the reporter's transcript is to be transmitted within 30 days of its designation/request. The term expressed in the rule is reflected in the Circuit's briefing schedule as a standard practice, even for cases from the Superior Court of Guam. But, there is no time needed for transcription in these cases because the transcript was necessarily prepared for proceedings before the Appellate Division. The Ninth Circuit has not configured itself in any way, despite authority to do so in 48 U.S.C. § 1424-3(c), to differentiate its self-described function as Guam's Supreme Court from its other roles as a United States Court of Appeals. [This is not stated as criticism of the court or any of its judges but only to make the point that the Appellate Division is in a better position institutionally to serve this function.]